IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of decision :November 14, 2006

1. Criminal Appeal No. 496-DB of 2002

Yashpal versus State of Haryana

2. Criminal Appeal No. 1216-SB of 2002

Balbir Singh versus State of Haryana

Coram: Hon'ble Mr. Justice Virender Singh
Hon'ble Mr. Justice A.N. Jindal

Present: Mr. Rahul Rathore, Advocate for both the appellants

Mr. Siddharth Batra, Assistant Advocate General, Haryana

Virender Singh, J.

Yet another case of sexual assault on a child.

We are disposing of Criminal Appeal No. 496-DB of 2002 filed by Yashpal son of Baru Ram and Criminal Appeal No. 1216-SB of 2002 filed by Balbir Singh son of Narain Singh, both residents of village Salwan, Distt. Karnal (hereinafter to be referred to as 'accused') after they have suffered conviction under section 376(2)(g), 342 and 506 IPC, vide impugned judgment of learned Sessions Judge, Karnal dated 20.5.2002.

Yashpal has been sentenced to undergo life imprisonment with fine of Rs 10,000/-, in default of payment of fine to further undergo RI for a period of one year under section 376(2)(g) IPC whereas under section 342 IPC, the sentence awarded to him is of six months only. For the conviction recorded under section 506 IPC, he has been awarded substantive sentence of one year. So far as Balbir Singh accused is concerned, for the same charge under section 376(2)(g) IPC the sentence awarded to him is 10 years and fine of Rs 10,000/-, in default of payment of fine to further undergo RI for one year. For the remaining two charges, he has been awarded the same sentence. However, all the sentences have been ordered to run concurrently.

Prosecutrix in this case is the daughter of Sharif, real brother of Mohinder Singh PW6, resident of Salwan, District Karnal. The name of the prosecutrix is not being disclosed in view of the judgment rendered by the Apex Court in **State of Karnataka vs Puttaraja** 2004(1) RCR (Criminal) 113. She will be referred to as 'prosecutrix' in our judgment. She was aged seven years at the time of occurrence. On 6.5.2001 at about 1.30 PM, she had gone out of her house in order to answer the call of nature and when she did not return for a pretty long time, aforesaid Mohinder Singh, her mother Smt. Mizra and son Sanjay proceeded in search of her. They could not trace her and at about 4.00 PM when they were returning to their house, they heard the cries of a child from inside the house of Yashpal accused. When they entered in, they saw Yaspal accused committing sexual intercourse with the prosecutrix and Balbir Singh accused was also found

present there pressing her mouth. She was lying naked. Accused Yaspal was also found naked as his pant and underwear were lying on one side. It is then the case of the prosecution that after seeing Mohinder Singh and his family members, they ran out from the spot but while leaving the spot, they had threatened the complainant side of their lives. The prosecutrix was bleeding profusely. She was initially brought to the house. Thereafter Mohinder Singh made a statement Ex. PF to ASI Jagdish Singh (PW10) of Police Station, Assandh at Bus Stand Salwan. On the basis of his endorsement Ex. PF/1, formal FIR Ex. PF/2 was recorded. It is alleged by aforesaid Mohinder Singh that for some time they did not go to the police out of fear because there is only one house of the complainant in the village of their community whereas the village was dominated by other community to which both the accused belong.

During the investigation Mohinder Singh had produced the underwear Ex. PG to ASI Jagdish Singh which was taken into possession in the shape of a parcel. The place of occurrence was also photographed vide photographs Ex. P9 to P12. Blood stained earth was also lifted from the place of occurrence vide separate parcel memo. An empty bottle of liquor without its closure was taken into possession vide recovery memo Ex. PJ. Site plan Ex. PN of the place of occurrence was also prepared. The prosecutrix was taken to the hospital and after her medico legal examination, clothes were taken into possession. Some parcels containing slides and other samples were also taken into possession.

On 7.5.2001 both the accused were formally arrested and were medico legally examined. The prosecutrix was also got X-rayed from General, Hospital to ascertain her age (ossification test).

After completion of the investigation, both the accused were challaned. They were charged under sections 376(2)(g), 342 and 506 IPC by the trial court.

The prosecution in support of its case has examined the following witnesses :

PW1 Dr. Meenu Gupta :

She had radiologically examined the prosecutrix on 7.5.2001 at General Hospital, Karnal and submitted her report Ex. PA/1. The age of the prosecutrix was declared as seven years.

PW2 Dr. S.H. Sehgal :

This witness had medico legally examined accused Yashpal and Balbir Singh and opined that there was nothing to suggest that they were in-capable of performing sexual intercourse. He had also proved the MLRs and reports of both the accused.

PW3 HC Dharambir Singh & PW4 C. Maman Singh :

Both these witnesses had tendered their affidavits Ex. PC and Ex. PD respectively.

PW 5 Constable Prem Kumar :

He is Draftsman and had proved his scaled site plan Ex. PE which he had prepared after visiting the place of occurrence.

PW 6 Mohinder Singh :

He is the complainant-FIR lodger. His version is already alluded to in the preceding paras where the facts of the prosecution case are narrated.

PW 7 Prosecutrix :

Being a child witness, the learned trial court had put certain questions to her before recording her statement in order to ascertain her capability to find out whether she was competent witness to depose on oath or not and after observing that she had given rational answers to the questions put to her, the learned trial court ultimately thought it proper to record her statement without oath as she was a student of Ist class. She had fully supported the case of the prosecution stating that Yashpal accused had taken her to his house and Balbir Singh the other accused was also with him. She further stated that both the accused did bad act with her in the house. She also stated that after the bad act was done with her, she started bleeding from inside her body and her uncle Mohinder Singh, her cousin Sanjay and her grand-mother Minzra had reached there and thereafter both the accused had left the place.

PW8 HC Ram Chander :

This witness was handed over copies of the FIR and he further delivered the same to the Ilaqa Magistrate, Superintendent of Police and DSP at their residence being a special report case.

PW9 Dr. Jyoti Shukla :

This witness had examined the prosecutrix on the police request and found that there was no external mark of injury on perineum and vulva. However, a tear was present in midline, starting from the posterior commissire which was ½ cm and ½ cm deep involving few muscle fibers. It was bleeding also. As per vagina examination, hymen was found ruptured and a tear of 1 cm x 0.5 cm was present in posterior vaginal wall in midline which was bleeding. Both the tears were stitched with chromic catgut and vaginal packing was done. She also stated that slides were prepared from posterior fornix of vagina, for sperm detection. She proved the medico legal report Ex. PL prepared by her.

PW10 ASI Jagdish Singh :

He is Investigating Officer. The entire investigation conducted by him has already been discussed in the opening paras of the judgment.

The plea taken by both the accused was of false implication. Yashpal accused pleaded that he and Balbir Singh have been implicated in this case at the instance of Kala and Satish of their village as he had a land dispute with them. However, no witness has been produced in defence.

After appreciating the entire evidence, both the accused have been convicted and sentenced as indicated hereinabove.

Hence, this appeal.

We have heard Mr. Rahul Rathore, learned counsel for both the accused and Mr. Siddharth Batra, learned Assistant Advocate General, Haryana. With their assistance, we have also gone through the entire records very minutely.

Mr. Rathore submits that the entire case is hinging upon the statement of prosecutrix who was a child witness of seven years and therefore, the learned trial court should not have based conviction of a witness of such a tender age who could very comfortably be tutored by her family members. According to Mr. Rathore, even otherwise her statement smacks of tutoring. He while taking us through her cross-examination submits that she had told that when she was being taken to house of Yashpal accused, 7/8 persons had met them on the way. If it is so then the persons who had noticed two accused taking the prosecutrix along would have certainly intervened. The learned counsel then submits that even otherwise from her statement one fact is clear that she was not aware of the names of both the accused and the same were told to her by the villagers after the occurrence. This fact by itself talks of the tutoring to a child witness and therefore, it is not safe to maintain conviction on her statement.

Mr. Rathore otherwise submits that the statement of Mohinder Singh who had been projected to be an eye witness of the occurrence is also

not appealing and it appears that he has been imported as a witness to lend support to the case set up by the prosecution. This weakness rather lend advantage to the defence set up by accused Yashpal to the effect that he has been implicated at the instance of Satish and Kala who were inimical towards him as land dispute was going on between them.

Mr. Rathore lastly submits that even otherwise case of Balbir Singh accused is distinguishable on facts as he being aged 60 years could not join hands with Yashpal. Balbir Singh was of the age of his father and could not dream of indulging into this nefarious activity along with him This rather reflects that some one from the village who was inimical towards them had manoeuvred the present case so as to settle his scores with them. The learned counsel in the same breath submits that even as per the observations of the learned trial court, Balbir Singh was found pressing the mouth of the prosecutrix and Yashpal was found committing rape on the prosecutrix. This indicates that the substantive statement of the prosecutrix alleging that both the accused did bad act with her has been disbelieved. All these facts create doubt at least with regard to the involvement of Balbir Singh accused.

Mr. Rathore also prays for an alternative relief qua Yashpal accused submitting that he was married person at the time of alleged occurrence and his entire family is dependent upon him. The imprisonment for life awarded to him, in fact, is a harsh view and, therefore, a lenient view may be taken in his favour with regard to the substantive sentence for

the main charge.

Controverting the submissions advanced by Mr. Rathore, Mr. Batra submits that may be some discrepancies have crept in the statement of the prosecutrix, but the same cannot be said to be enough to discard the case of the prosecution in its entirety. Even otherwise the conviction can be based on the sole testimony of the prosecutrix whereas in the case in hand it is corroborated by the statement of Mohinder Singh her uncle. The learned State counsel otherwise submits that the medico examination of the prosecutrix is enough to show that forceful sexual intercourse has been committed upon her and she has also categorically stated in her substantive statement that both the accused did bad act with her. They are from her village and there cannot be any mistaken identity. It is most natural statement of the prosecutrix ruling out every possibility of tutoring.

On the basis of the said submissions, Mr. Batra submits that both the accused have no escape.

With regard to the sentence part, Mr. Batra contends that there is no mitigating circumstance in favour of the accused Yashpal warranting any lenient/sympathetic approach of this Court and therefore, the sentence already awarded to him deserves to be maintained.

After hearing the rival contentions of either side and going through the entire evidence and the other relevant documents very carefully, we are of the view that the prosecution has been able to bring home all the charges against both the accused beyond any shadow of doubt and

therefore, the conviction as recorded by the learned trial court qua all the three charges deserves to be upheld. We are now entering into a detailed discussion meeting all the arguments advanced by Mr. Rathore collectively.

After ascertaining the capability of prosecutrix to depose in the court, she made the following statement before the trial court :

> "I know both the accused, present in the court today whose names are Balbir and Yash Pala. At about noon time I had gone to answer the call of nature from our house. Accused Yash Pala had taken me to a house from the kurdi, owned by Yash Pala. Accused Balbir was also with accused Yash Pala. Both the accused did bad thing with me in the house. I was wearing an underwear and shirt at that time. Accused Yash Pal was wearing a pant and shirt. Accused Balbir was wearing a dhoti and kurta. They were also wearing underwears. When the accused persons did bad thing with me I started bleeding from inside the body. My great uncle Mohinder Singh, my counsin Sanjay and my grand mother Minzra had reached the spot and thereafter both the accused ran away from the spot."

We have evaluated very carefully the evidence of the prosecutrix and find no basic flaw in it. Although she has been cross-examined at length from the defence side yet she remained un-shaken on all

the vital aspects. So far as declaring her competent witness, the court had put certain questions to her and found that she was giving rational answers. However, taking in to consideration her tender age she was examined without oath. We do not find any flaw on that aspect also. Even Mr. Rathore has also not joined issue with us on her being not a competent witness and his only stress was that she could fell prey to tutoring, which argument, at least, to our mind is not convincing as we do not find any tinge of tutoring in her substantive statement.

To arrive at the just conclusion we have examined the statement of Mohinder Singh her uncle. He states that when he reached near the house of Yashpal accused he heard the shrieks of child emanating from a house and saw that Yashpal was committing bad act (rape) with her niece whereas Balbir Singh the other accused had gagged her mouth. When the prosecutrix stepped into witness box, she stated that both the accused did bad act with her in the house. She is not specifically naming Yashpal so far as allegation of committing rape upon her is concerned. She further stated that when the accused persons did bad act with her, she started bleeding from inside the body. On the other hand Mohinder Singh in his substantive statement stated that Yashpal was doing sexual intercourse with the prosecutrix. Had the prosecutrix been tutored by Mohinder Singh or as matter of fact by any outer agency, she would have toed the line of Mohinder Singh PW only. In a very pure manner, she stated that both did bad act with her. This speaks volumes of the fact that

the statement of the prosecutrix is absolutely natural and un-adulterated having no tinge of tutoring in it. We may observe here that we do not find any reason to see the statement of Mohinder Singh with an eye of suspicion. The medical examination of the prosecutrix as described herein above, itself is sufficient to hold that she has fallen prey at the hands of both the accused. We do not feel the necessity of reproducing the medical evidence for the purpose of our discussion.

An attempt made by Mr. Rathore to segregate the case of Balbir Singh from that of Yashpal accused, in our view, is again a futile exercise in itself. Both the accused have been charged under section 376 (2)(g) IPC. The explanation given under this section is clear that where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub section. According to the statement of Mohinder Singh, Balbir Singh was found pressing the mouth of the prosecutrix, whereas Yashpal was committing rape upon her. Therefore, in the present scenario both the accused are liable for the offence of gang rape as defined under section 376(2)(g) IPC. At the same time the other two charges under sections 342 and 506 IPC qua both the accused are also proved to the hilt.

We may observe here that the last limb of argument with regard to reduction in sentence qua Yashpal accused is again of no consequence.

In **State of Karnataka vs Krishappa** AIR 2000 SC 1470, the Hon'ble Apex Court observed that sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her esteem and dignity. It degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The Courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely.

In **State of Rajasthan vs Om Prakash** 2002 (2) RCR (Criminal) 764, their Lordships of Hon'ble Apex Court have held that child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of sexual pleasure. There cannot be anything more obscene than this. It is a crime against humanity. Many such cases are not even brought to light because of the social stigma attached thereto. According to some surveys, there has been a steep rise in child rape cases. Children need special care and protection. In such cases, responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to these children. There physical and mental immobility call for such protection. Children are the natural resource of our country. They are the country's future. Hope of tomorrow rests on them. In our country, a girl child is in a very vulnerable position and one of the modes of her exploitation is rape besides other modes of sexual abuse. These factors point

towards a different approach required to be adopted. No sympathy or leniency was shown in this case as the accused had played with the life of a child of 8 years.

In **Puttaraja**'s case (supra) their Lordships have observed that a rapist not only causes physical injuries but also indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, chastity, honour and reputation.

As a sequel to the aforesaid discussion, in our view, Yashpal accused does not deserve the least sympathy of this Court with regard to sentence.

While upholding the conviction of both the accused qua all the charges, we hereby affirm their sentence also.

The net result is that both the appeals bearing Criminal Appeal No. 496-DB of 2002 Yashpal versus State of Haryana and Criminal Appeal No. 1216-SB of 2002 Balbir Singh versus State of Haryana are dismissed on all the counts.

(Virender Singh)
Judge

(A.N. Jindal)
Judge

November 14, 2006
'dalbir'

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of decision :November 14, 2006

Criminal Appeal No. 1216-SB of 2002

Balbir Singh versus State of Haryana

Coram: Hon'ble Mr. Justice Virender Singh
Hon'ble Mr. Justice A.N. Jindal

Present: Mr. Rahul Rathore, Advocate for the appellant

Mr. Siddharth Batra, Assistant Advocate General, Haryana

Virender Singh, J.

For detailed judgment, see Criminal Appeal No. 496-DB of 2002 Yashpal versus State of Haryana.

(Virender Singh)
Judge

(A.N. Jindal)
Judge

November 14, 2006
'dalbir'